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In The

Supreme Court of the United States

October Term, 1982

OSWALD P. GONZALEZ,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a person ordered from an automobile which is surrounded by two police cruisers and four police officers, the commander of whom has already decided to make an arrest, is free to leave and need not be advised of his constitutional rights before being asked whether he has any drugs or money in his possession.

(2) Whether a factually devoid conclusory accusation of criminal activity by an unnamed informant of untested reliability is sufficient to create probable cause to search or arrest.

(3) Whether associating with a residence at the same time as a person police suspect of making a cocaine purchase, driving a Cadillac with California plates in Nebraska, carrying a leather pouch in a strange manner, being "dark complected and possessing more than $1,000 is sufficient to create probable cause to arrest."

(4) Whether a person named in a search warrant for a residence and in the affidavits in support thereof as the owner or controller has had his substantive Fourth Amendment rights violated by a search of that residence.

(5) Whether a single warrant issued for the search of a residence owned by one person and an automobile parked miles away and owned by another unrelated person is a general warrant.

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Petitioner, Oswald P. Gonzalez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Nebraska entered in this case on May 28, 1982. The Petitioner's timely filed motion for rehearing was overruled on July 21, 1982.

OPINION BELOW

The opinion of the Supreme Court for the State of Nebraska is reported at 80 S. C. J. 697, May 28, 1982 and the Companion case of *State v. Longa* is reported at 80 S. C. J. 356, April 23, 1982, and a copy of each is included in Appendix A.

JURISDICTION

The Petitioner was convicted of possession of a controlled substance with intent to deliver, to wit: cocaine. He was tried jointly with a co-defendant Cristobal Longa. The Petitioner was sentenced to one to three years in the Nebraska Penal and Correctional Complex, Cristobal Longa was sentenced to three to five years in the Nebraska Penal and Correctional Complex.

Prior to trial he filed motions to suppress evidence obtained in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. The motions were denied and he was convicted by a jury.

A timely appeal was prosecuted to the Supreme Court of the State of Nebraska where the petitioner alleged that the trial Court erred in overruling his motions to suppress evidence obtained in violation of Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States. His conviction was affirmed. A timely motion for rehearing was overruled on July 21, 1982 and is contained in Appendix D.

On August 13, 1982 the Petitioner appeared before the trial Court who continued his cash appeal bond of $25,000 pending a final determination by this Court.

Jurisdiction of the United States Supreme Court to review the decision of the Illinois Supreme Court by Petitioner for Writ of Certiorari is conferred by 28 U. S. C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 29-829 R. R. S. Neb. 1943 are set forth in Appendix B.

STATEMENT OF MATERIAL FACTS

On September 3, 1980 at approximately 6:00 p.m. the Petitioner Oswald P. Gonzalez was arrested in a convenience store parking lot, at 33rd and Cass in Omaha, Nebraska along with his co-defendant Cristobal Longa. The two had been observed leaving a residence shortly after a person the Omaha Police were following left the residence. This person they were following, later identified as James Sorenson, was one of a number of people the police had followed from a house at 4057 Frederick Street. The police had received reliable information that one of the people

leaving that address would be going to make a cocaine purchase. Initially, the police were informed that it would be a person by the name of Ned Reynolds, but later were told that it would not be Mr. Reynolds, but that it would be someone else but the informant was not able to ascertain who it would be.

Mr. Sorenson was followed from Frederick Street to 3524 Jackson Street. He remained in the house for fifteen to thirty minutes. While he was inside the house a Pinto with two occupants arrived in front, the passenger went into the house for a few minutes, when he entered he was carrying a magazine in his hand, when he left he was not carrying anything. The Pinto had a Nebraska license plate. The Pinto was followed by the Omaha Police and stopped at gunpoint at approximately the same time the Petitioner was arrested. The occupants of the Pinto were questioned, the automobile searched and then they were released. It was determined that they had returned a Playboy magazine that they had borrowed from one of the occupants of 3524 Jackson.

When Sorenson left 3524 Jackson he was followed by the Police to 422 N. 34th Street. A reliable informant had advised the police that he had observed cocaine packaged for street sale at this address and the police had obtained a warrant for its search. Officer Katherine McKillip remained at 3524 Jackson on foot. When Sgt. O'Donnell learned that Sorenson had gone to 422 N. 34th Street, he returned to pick up Officer McKillip. The

police had no prior information about the occupants of 3524 Jackson or the address itself.

When Sgt. O'Donnell returned to pick up Officer McKillip, she advised him that Mr. Longa and Mr. Gonzalez who were just pulling away from the curb had been inside 3524 Jackson street. She advised Sgt. O'Donnell that they had stood in the front yard and talked for a few minutes with two other people who left on foot. She indicated the occupants of the Cadillac were dark complected and the driver, Mr. Gonzalez had carried a small shaving kit type of bag under his shirt, until he reached his car and then she had observed him place it in the front seat of the car. The passenger, Mr. Longa was observed by Officer McKillip removing something from the back seat and putting it in the trunk. Sgt. O'Donnell was able to observe that the automobile was a black Cadillac with California license plates. Sgt. O'Donnell decided to arrest the Petitioner and his companion and radioed for assistance.

The Cadillac was followed about a mile to a convenience store. The driver pulled the car up to the front of the store and the passenger got out. Sgt. O'Donnell pulled his unmarked cruiser in behind the vehicle and approached on foot with Officer McKillip. Sgt. Gutchewsky pulled his cruiser alongside the Cadillac and approached simultaneously with O'Donnell. Officer Prokopek who had been sitting in the parking lot when the Cadillac arrived also assisted Sgt. O'Donnell.

Sgt. O'Donnell identified himself as a police officer and ordered the Petitioner from his automobile. He gave him a pat-down search and then began to question him.

There are different versions of this from Officers Gutchewsky and McKillip. Gutchewsky testified O'Donnell handcuffed the Petitioner before he was questioned and Officer McKillip testified that the first thing that was done when the police arrived at the Cadillac was to advise Mr. Gonzalez and Mr. Longa that they were under arrest.

Sgt. O'Donnell first asked Mr. Gonzalez if he had any money or drugs in the car. Mr. Gonzalez indicated he did have money but there were no drugs. Sgt. O'Donnell then asked him how much money and Mr. Gonzalez replied he was not sure how much. Sgt. O'Donnell then asked him if there was more or less than one thousand dollars and Mr. Gonzalez replied that there was more than $1000. It was at this point that Sgt. O'Donnell testified he handcuffed the Petitioner and put him in Sgt. Gutchewsky's cruiser. It is undisputed that Sgt. O'Donnell never attempted to question the Petitioner about his name, address or an explanation of his actions at the scene of the arrest. It is also undisputed that the Petitioner was never advised of his constitutional rights before being questioned by Sgt. O'Donnell.

Mr. Longa and Mr. Gonzalez were taken to Central Station. Shortly after their arrest James Sorenson was observed leaving 422 No. 34th with a female companion. He was followed to 4057 Frederick Street. Upon his return a warrant which had been obtained earlier in the afternoon was executed. Suspected cocaine was found and six people were arrested. A warrant was then executed on 422 No. 34th and more suspected cocaine was

found. While these warrants were being executed 3524 Jackson Street was left without any police surveillance.

The police then obtained a warrant for 3524 Jackson and the Petitioner's black Cadillac. The warrant was for both the house, and the Cadillac which was now at the police tow lot. It is interesting to note that a television crew filmed the execution of these warrants and the Petitioner's Cadillac being towed from the convenience store parking lot. Television crews interviewed Lt. Olson and he advised them that this was a big bust and that some high level out-of-town people had been apprehended. These interviews took place at around 7:00 p.m. and were shown on the 10 o'clock news. A videotape copy of one of the three local stations' news stories was introduced by the Petitioner into evidence at the trial.

Sometime after 10 o'clock the police obtained a warrant for the search of 3524 Jackson and the Petitioner's Cadillac. The affidavits in support of the warrant related the arrest of the Petitioner and his companion in the parking lot, however, the affidavit differs in two important respects from the evidence adduced. One, the affidavit indicates that Mr. Longa and Mr. Gonzalez were questioned on the scene by Sgt. O'Donnell about their presence at 3524 Jackson and both denied being there. O'Donnell later testified that he questioned them about 10:00 p.m. and Mr. Longa told him he was at 3524 Jackson visiting friends and talking about the weather and Mr. Gonzalez told him he had just arrived in town and was looking for a place to stay; two, the affidavit indicates that at the scene "they" advised Sgt. O'Donnell that "they" had a lot of money in the car, more than $8,000. Sgt.

O'Donnell testified, however, that Mr. Gonzalez had advised he did not know how much money he had and testified he only asked if it was more than $1,000.

The other information in the affidavits related to the observation of Mr. Sorenson coming and going and a statement from an informant that

> has given Sgt. O'Donnell information concerning this cocaine information (sic) which at face value appears to be true and accurate. This informant stated that the two Cuban parties arrested by the officers were the main suppliers for the cocaine delivered at 4057 Frederick and that one of their suppliers is a person by the name of Scott Rosencrantz and that this person lives at 3524 Jackson . . . Source also stated that the two Cuban persons may possibly have more cocaine in their possession. (Ex. 2.)

At about 9:00 p.m. warrant was obtained. Mr. Rosencrantz arrived at 3524 Jackson with a young woman named Karen Fellows. They were both arrested outside and held. Karen Fellows was later released after being held for a number of hours without explanation for her arrest or release. It was later determined that she had gone to Mr. Rosencrantz to pick up some type of employee schedule.

Sometime after 10:00 the warrant was executed at 3524 Jackson and at the police tow lot. Cocaine and money were found at 3524 Jackson. More than eighty-seven hundred dollars in cash was found in a bank bag in the front seat of the Cadillac. No controlled substances or illegal materials were found in the Cadillac. Mr. Gonzalez and Mr. Longa remained in jail.

Mr. Rosencrantz was questioned about where the "Cubans" were staying and he advised Sgt. O'Donnell that they were staying at the New Tower on 78th and Dodge. O'Donnell and his men went to the New Tower and found no evidence of the Cubans but did find a registration to Scott Rosencrantz. Sgt. O'Donnell then questioned Rosencrantz again who told Sgt. O'Donnell that if the "Cubans" were not at the New Tower motel he did not know where they were. Sgt. O'Donnell and his men then began a systematic check of motels and hotels and discovered a registration at the Thrifty Scott to Mr. Longa and Mr. Gonzalez. Lt. Olson then had his typist strike out the New Tower and insert Thrifty Scott, Room #407. The affidavit falsely indicated that Scott Rosencrantz told Sgt. O'Donnell that the "Cubans" were staying at the Thrifty Scott, Room # 407 and that this information had been verified by Officers Gorgen and Wills.

The Thrifty Scott Motel, Room # 407 was searched and approximately a half pound of cocaine was found concealed in the room along with $3,800.

STAGE OF THE PROCEEDING IN WHICH THE FEDERAL QUESTION WAS RAISED

The Federal question was raised by written motion prior to trial in conformance with the local rules of practice and preserved in the Nebraska Supreme Court. The motions which were filed are found in Appendix C, along with the trial court's order denying the motions.

REASONS FOR GRANTING THE WRIT

I.

The lower Court's decision is in conflict with at least three important decisions of this Court and is an appropriate case for summary reversal.

A. *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Sgt. O'Donnell had decided to arrest the Petitioner before he approached his car, he then identified himself as a police officer and ordered the Petitioner from his car and patted him down. Whether or not he was in handcuffs, he was clearly not free to leave and had not been advised of his rights. The State conceded these facts in the lower court:

> The appellant was arrested as he exited his vehicle upon the demand of the Omaha Police officers. Immediately upon exiting his vehicle, the appellant was asked by an officer whether there were any drugs or money in the vehicle and the appellant replied that there were no drugs but there was money (13:20).
>
> At the time the appellant made this statement he was evidently under arrest but had not been given his Miranda warnings. (Brief of Appellee pp. 11-12.)

The statement obtained from him or an exaggeration of it was used in the affidavits in support of the warrant of his automobile, of 3524 Jackson and of his motel room.

B. *Aguilar v. Texas*, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964).

The only information in the affidavits in support of the search of any of the Petitioner's property which is not totally innocuous is the ambiguous statement from an

untested informant who gave information which "appeared to be true and accurate at face value", there is absolutely no information given to the magistrate to conclude that the informant is reliable or any factual basis to support his allegation. He did not even refer to the Petitioner and his companion by name or give the slightest suggestion of where his information originated.

C. *U.S. v. DiRe*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 2d 210 (1948).

Mr. Gonzalez was one of a number of people arrested because of their association with 3524 Jackson. The association with that address led to the gunpoint detention and search of two completely innocent young men and to the detention of a young woman who went to 3524 Jackson on a legitimate business errand. How many other people received similar treatment in this case and in other incidents in the City of Omaha. To fail to require the lower Court to adhere to this longstanding and settled decision will do far greater injustice to the public than is being done to the Petitioner.

II.

The lower Court decision that the Petitioner must prove standing by showing a property right in the invaded place presents a question not answered in Rakas v. Illinois, 439 U.S. 128, 99 S. Ct. 421, 58 L.Ed. 2d 387 (1978) and Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556, 65 L.Ed. 2d 633 (1980).

The Petitioner in the case at bar was named as the owner and controller of the residence located at 3524 Jackson Street. However, evidence offered by the state suggests that someone else lived there.

In *Zurcher v. Standford Daily*, 436 U. S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1975) this Court held that a warrant could be issued for the search of innocent third parties. The juxtaposition of *Rawlings, supra*, and *Zurcher, supra*, creates a situation where the police have to be especially scrupulous when obtaining a warrant for the search of a criminal suspects home, but not the homes of the innocent people with whom the criminal might have visited socially or involved somehow. The adequacy of the affidavits in support of the searches of innocent third parties is not reviewable. Can a person whose private papers are rummaged through by a police officer acting in good faith but with a warrant which was obtained with insufficient affidavits, sue the police officer acting pursuant to a Court order? Can he sue the Magistrate? By diminishing standing, the purpose of the exclusionary rule is undercut and it will serve to protect the guilty, but will not discourage the police from unlawful invasions of the home of the innocent.

III.

The Court has not decided whether a single warrant for the search of two separate and distinct pieces of property owned by two unrelated individuals is a general warrant which should be struck down and invalid on its face.

In the case at bar the Petitioner is alleged to be the owner of both the Cadillac and 3524 Jackson, although the

affidavits are at best ambiguous. This warrant should be struck down as a general warrant since it calls for the search of two totally separate pieces of property, owned by two different individuals.

CONCLUSION

Arrest based on mere association in this case resulted in the gun point detention of two totally innocent young men and an unexplained detention of a completely innocent young woman. Approval of this documented conduct of the Omaha Police will only serve to encourage it.

The healthy degree of police zeal was in the case at bar heightened to a frenzy when "out of town" people were arrested. This frenzy was further heightened by the televised execution of the search warrants. Once the police advised TV news that a "big bust" had been made, the protections of the Fourth and Fifth Amendments yielded to the needs of public relations. Not only are the affidavits in support warrants facially deficient, they are, in fact, false.

The sentence of 1 to 3 years received by the Petitioner is not unjust, the injustice in this case will be to the citizens of Omaha, Nebraska, whose Police Department is well aware of this case.

The diminution in freedom to all the citizens of Omaha cannot be so easily measured as Petitioner's sentence.

The lower Court's disregard of long standing principles of the Fourth and Fifth Amendments makes this an appropriate case for this Court to exercise its supervisory powers and grant the Petition.

Respectfully submitted,

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